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No. 87-470

In The
Supreme Court of the United States
October Term, 1987

FORT WAYNE BOOKS, INC.,
Petitioner,

vs.

STATE OF INDIANA, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

BRIEF OF BURKE MENDENHALL AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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Burke H. Mendenhall submits this brief, *amicus curiae*, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of the petitioner in No. 87-470, having obtained the written consent of both the petitioner and the respondent to file same.

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INTRODUCTION

Solely by virtue of his status as landlord to an adult bookstore, *Amicus* Burke H. Mendenhall became a defendant in the parallel Indianapolis civil RICO action, *Goldsmith v. 4447 Corporation,* consolidated with the present case in both of the Indiana appellate courts below. His original tenant, Burton Gorelick d/b/a Plaza Entertainment Center, a co-defendant, has long since vacated the premises which had been padlocked pursuant to the Indiana RICO/CRRA statutes[1] prior to the bookstore's ever opening for business. Yet today, more than four years after this litigation commenced, Mendenhall's property remains physically padlocked under the original 1983 court-ordered seizure and he has been unable to obtain a trial of the charges against him. Despite Mendenhall's repeated attempts to establish his nonliability under the RICO/CRRA statutes, the Marion County prosecutor reimposed this draconian padlocking restraint after Mendenhall relet the premises to a successor tenant, a completely unrelated video store against which no RICO, obscenity, or any other complaint has ever been lodged.

Initially, Mendenhall, an Indianapolis businessman and real estate developer, constructed a small shopping plaza located at 4266 West 38th Street, adjacent to the much larger Lafayette Square shopping center in a commercial district of suburban Indianapolis. The 7,000-square-foot plaza, of which the property at issue here

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[1] The Civil Remedies for Racketeering Activity (CRRA) statute, I.C. 34-4-30.5-1, *et seq.,* creates a civil RICO cause of action entailing injunctive and forfeiture remedies. The relevant provisions of the Indiana Code cited herein are reproduced in Appendix F to the Petition for Writ of Certiorari.

comprised some 5,000 square feet, was completed and originally made available for lease in 1974. Through a real estate broker, Mendenhall later entered into a normal commercial lease with Burton Gorelick, leasing him the large retail storeroom in which Gorelick intended to operate the Plaza Entertainment Center, an adult bookstore and video outlet. Gorelick took possession of the premises on June 1, 1983, and began preparations to open for business as an adult bookstore, obtaining the necessary zoning and use permits and complying with all other legal requirements prior to the scheduled opening date of August 1, 1983.

Just before the Plaza Entertainment Center was to open for business, Marion County Prosecutor Stephen Goldsmith initiated the civil RICO action which was consolidated on appeal with the present case. In his complaint filed August 1, 1983, Goldsmith alleged the existence of an "illegal enterprise" in violation of the Indiana RICO statute, I.C. 35-45-6-1 *et seq.,* consisting of the Plaza Entertainment Center and two other operating adult video and book stores allegedly under the common ownership and control of Burton Gorelick. Along with the corporate defendants and the individual owners, operators and employees of the adult bookstores, Mendenhall and the landlords of one of the two operating adult bookstores were also named as defendants.

Even though there were no prior obscenity convictions related to the operation of any of these bookstores, and indeed the Plaza Entertainment Center *had never even opened its door to the public,* Goldsmith sought to padlock the Plaza Entertainment Center and ultimately to

obtain the forfeiture of the other two bookstores. The complaint invoked the entire panoply of injunctive and forfeiture remedies against all of those allegedly associated with this "illegal enterprise," the purpose of which was "to operate . . . adult bookstores." To establish probable cause, the complaint relied upon an affidavit relating that Indianapolis police detectives had visited the two operating adult bookstores, where they discovered sexually explicit magazines, films and videotapes, and purchased four of the films. The police affidavit also recited that detectives visited the unopened Plaza Entertainment Center, where construction workers informed them that sexually-oriented materials would be available for sale when the store opened. This affidavit and the films were adduced to establish probable cause to believe that the alleged "enterprise" had twice violated Indiana obscenity laws, as predicate offenses subjecting the defendants to RICO liability under I.C. 35-45-6-2 and the related Civil Remedies for Racketeering Activity (CRRA) statute, I.C. 34-4-30.5-1 *et seq.*

Filed with Goldsmith's complaint, the Petition for Seizure of Property Subject to Forfeiture alleged that the defendants intended to open the Plaza Entertainment Center in furtherance of their "racketeering activity," *i.e.*, "dissemination of obscene material." The petition asserted that the new, unopened bookstore could be padlocked because it was under common ownership and control along with the other two bookstores. The petition further alleged in conclusory fashion that the new bookstore would probably distribute obscene materials in the future. This latter assertion was completely unsupported by the probable cause affidavit, which neither specified nor described any of the Plaza Entertainment Center's wares, and could hardly have alleged any obscenity violations on the part of this unopened bookstore which had yet to distribute the first book, film, or magazine.

Following *ex parte* proceedings held the same day the complaint and petition were filed (August 1, 1983), the Marion Circuit Court immediately ordered the seizure of Mendenhall's property, and the Plaza Entertainment Center was padlocked by the Indianapolis police. The trial court found probable cause to believe that the two existing bookstores were in violation of the RICO Act and therefore concluded the property leased by the third bookstore, *i.e.*, Plaza Entertainment Center, was also subject to forfeiture. While the seizure order allowed the other two bookstores to remain open, the Plaza Entertainment Center remained sealed until the Indiana Court of Appeals stayed this order on February 2, 1984, some six months later.

The tenant defendants filed motions to dismiss the complaint and to strike the *ex parte* seizure order on August 4, 1983, challenging the lack of procedural safeguards in the statutory scheme and more fundamentally noting that the Indiana RICO-CRRA statutes as applied to sanction alleged obscenity constituted an unlawful prior restraint in violation of the First and Fourteenth Amendments, under the rule of *Near v. Minnesota*, 283 U.S. 697 (1931). Following transfer of venue to the Hamilton Circuit Court, the tenant defendants again asserted substantive and procedural First Amendment violations in their September 12, 1983 Motion to Vacate the Order of August

1. The trial court denied these motions on November 21, 1983.

Immediately thereafter, on December 1, 1983, Mendenhall filed his own motion to dismiss, on grounds that the complaint was legally insufficient to establish any liability on his part under the RICO/CRRA statutes. As to Mendenhall, the amended complaint of September 8, 1983, stated only that he owned the real property leased to Plaza Entertainment Center. Implicitly, the complaint alleged that simply by his leasing of retail premises for operation of the Plaza Entertainment Center, Mendenhall had participated in and associated with the allegedly criminal "Gorelick Enterprise," rendering his property subject to forfeiture.

For over six months, the trial court failed even to set for hearing Mendenhall's motion to dismiss asserting that his arms-length landlord-tenant relationship with Gorelick hardly sufficed to establish participation in any "criminal enterprise." Only after Mendenhall had petitioned the Indiana Supreme Court to withdraw the cause from the trial judge was the matter set for hearing; the trial court finally denied the motion without explanation on August 15, 1984.

Two weeks after the summary denial of his motion to dismiss, on August 29, 1984, Mendenhall filed a motion for a separate trial, again asserting the lack of a legal and

factual basis for the action against him. This motion too was summarily denied on September 24, 1984.[2]

Meanwhile, the corporate defendants and Burton Gorelick pursued an interlocutory appeal, challenging the Indiana RICO/CRRA statutes on First and Fourteenth Amendments grounds. Mendenhall did not join in this appeal,[3] which effectively stayed proceedings in the trial court. On February 25, 1985, the Court of Appeals formally ordered a stay of the trial court proceedings pending its resolution of the constitutional issues.[4] Pending the very protracted appellate litigation in the Indiana Court of Appeals and then the Indiana Supreme Court, therefore, Mendenhall was unable to obtain any trial court adjudication of his nonliability under the RICO Act.

The Indiana Court of Appeals subsequently held the challenged statutes facially invalid as applied to the predicate offense of obscenity, only to be reversed by the Indiana Supreme Court. The Indiana Supreme Court's

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2 Somewhat inexplicably, on December 27, 1984, the plaintiff stipulated to dismissal as to the other landlord-defendants, Disk Development, Ivan Chalfie, and Henry Kahn, but not as to Mendenhall. Except for the legal pressure brought to bear upon Mendenhall by adjoining landowners, who then operated the largest shopping mall in Indiana adjacent to Mendenhall's premises, the situation of all the landlord-defendants was materially identical.

3 Thus Mendenhall, although a defendant in one of the consolidated cases from which this petition arises, did not raise these federal questions in the Indiana appellate courts, and has no standing directly to raise the issues before this Court as a petitioner for a writ of certiorari. *See, Puget Sound Power & Light Co. v. King County*, 264 U.S. 22 (1924).

4 The appeal by the co-defendants therefore prevented Mendenhall from obtaining a trial because his motion to dismiss had been denied as was his motion for a separate trial.

decision of March 2, 1987, upheld not only the statutory sanctions of padlocking and seizure of inventory and fixtures, but also finally concluded as a matter of state law that the entire statutory scheme (necessarily including its ultimate sanction of forfeiture) is immune from First Amendment challenge. (See petitioner's appendix at 8-15.) Accordingly, there has been a decision by the state court of last resort that the statutes' post-trial forfeiture remedies do not violate the First Amendment.

While the state appeals were pending, tenants Burton Gorelick and Plaza Entertainment Center defaulted under the lease of Mendenhall's property, and the store has since been relet to the Video and Gift Center, Inc., which took possession of the property on August 1, 1987. However, in light of the Indiana Supreme Court's decision, Prosecuting Attorney Goldsmith wasted no time in padlocking the business premises of this new, completely unrelated tenant. Asserting his authority to do so under the original *ex parte* order of the Marion Circuit Court, Goldsmith has padlocked another communicative establishment, even though this one is in no way implicated in the ongoing RICO litigation. Video and Gift Center, Inc. has initiated a civil complaint against Goldsmith and the City of Indianapolis in the Marion County Superior Court, Cause No. S487-1277, filed October 14, 1987, asserting the lack of lawful authority for this restraint. Video and Gift Center's application for temporary restraining order is currently set for hearing on November 9, 1987.

Mendenhall, meanwhile, petitioned the Indiana Supreme Court for a stay of the padlocking order, pending

disposition of this petition for certiorari. This application for stay was denied on September 2, 1987. (A copy of the order denying that stay appears in Appendix B to the petition for writ of certiorari.)

As *amicus*, then, Mendenhall's interest in this litigation is both direct and symbolic. The release of his rental property from court-ordered seizure turns on the resolution of the issues presented by the petition. From a broader perspective, however, he represents the dilemma these pre-trial seizure and ultimate forfeiture provisions pose for any property owner who would lease premises to a communicative enterprise. As a landlord who desires to continue renting retail space to unrelated video stores or bookstores, this *amicus* has been directly affected by the over-reaching sanctions of the RICO/CRRA statutes, which cast a chilling pall over the operation of such communicative businesses and patently threaten the free circulation of protected First Amendment materials.

INTEREST OF AMICUS

Amicus Mendenhall's experience in this civil RICO litigation illustrates from yet another perspective the deeply-flawed nature of the RICO statutory scheme as a response to obscenity. His role exclusively as arms-length landlord to a communicative enterprise, an adult video and book store, has resulted in two separate instances of the physical seizure of his property, the latest involving the padlocking of a new tenant's First Amendment business long after the tenant alleged to be part of the "il-

legal enterprise" had disappeared from the scene. Despite this landlord's repeated and vigorous attempts to litigate his nonliability under the RICO/CRRA statutes by means of motions to dismiss and for a separate trial, title to his property has remained under the cloud of court-ordered seizure for over four years with no opportunity for a trial.

Pursuant to the RICO/CRRA statutes, Mendenhall has patently been denied the most basic guarantees of procedural and substantive due process. Of course, these issues have not been addressed by the appellate courts of Indiana and are not before this Court, except insofar as they serve to underscore the abusive manner in which the RICO/CRRA statutes have been applied, and their far-reaching implications for protected First Amendment activity.

Nonetheless, as a landowner who wishes to continue leasing his premises to communicative businesses, Mendenhall necessarily shares petitioner's concern with the fundamental issue presented by this petition for certiorari: whether the seizure and forfeiture of entire bookstores and theaters as punishment solely for obscenity as unprotected speech contravenes the free-speech guarantees of the First Amendment. From Mendenhall's standpoint, these seizure and forfeiture remedies upheld by the Indiana Supreme Court not only threaten the direct imposition of unconstitutional prior restraints and impose a strict regimen of self-censorship on all communicative businesses; they also chill and deter innocent third parties, *i.e.* landlords, from leasing their property to bookstores, theaters, or video outlets that might sell *any* sexually oriented materials, no matter how tame or within

the bounds of community acceptance. Because a commercial landlord cannot make an item-by-item analysis of the entire book or videotape inventory of its tenant, the only commercially feasible response is to draft leases prohibiting the sale of *any* media materials which are even remotely sexually oriented.

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ARGUMENT

In *Near v. Minnesota*, 283 U.S. 697 (1931), this Court held that it was the "*operation and effect*" of the statute under review which determined whether it would be subject to First Amendment scrutiny as a prior restraint. 283 U.S. at 708. (Emphasis added.)

In this case, the Indiana Supreme Court departed from this required analysis by simply looking at the presumed legislative *intent*. Concluding that the state's RICO laws were not *intended* as a prior restraint, the Court reasoned that it was unnecessary to examine the operation and effect of the statutes as applied to the predicate offense of alleged obscenity violations. Under a proper *Near* analysis, the Court would have instantly recognized that, as applied to punish exclusively expressive conduct, the RICO statute has an impermissible *effect*, *i.e.* it allows the state to completely restrain both present and future expression simply because two or more of thousands of different media items, all presumptively protected by the First Amendment, are found to be probably obscene. A holding more

fundamentally at odds with the prior restraint doctrine of *Near* could hardly be imagined.[5]

This Court's most recent treatment of this issue came last year in *Arcara v. Cloud Books, Inc., supra,* — U.S. —, 106 S.Ct. 3172 (1986). In *Arcara,* the majority held permissible the closing of a bookstore under a generally-applicable public health nuisance statute, solely on grounds that illicit sexual activity, including prostitution, took place on the premises. The Court emphasized that the statute was aimed at conduct which involved "absolutely no element of protected expression." 106 S.Ct. at 3177. Chief Justice Burger for the majority carefully distinguished as an unconstitutional prior restraint under *Near* any such closure of a bookstore "on the basis of an advance determination that the distribution of particular materials is prohibited." Fn. 2, *id.* In such a case, "where it was conduct with a significant expressive element that drew the legal remedy in the first place," the usual strict scrutiny under the prior restraint doctrine would apply.[6] *Id.* at 3177-78.

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[5] Indeed, beyond its pretrial seizure and post-judgment forfeiture remedies, the RICO/CRRA statutory scheme goes so far as to authorize an injunction "prohibiting a defendant from engaging in the same type of endeavor as the enterprise in which he was engaged" in violating the RICO Act, so that a defendant could be precluded from future operation of any other presumptively-protected bookstore or theater. I.C. 34-4-30.5-2.

[6] To further underscore this point, Justice O'Connor, joined by Justice Stevens, concurred specifically to distinguish the closure in *Arcara* from an invalid prior restraint based on expressive conduct: "If . . . a city were to use a nuisance statute as a pretext for closing down a book store because it sold indecent books . . . , the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review." *Id.* at 3178.

Accordingly, this Court in *Arcara* unanimously makes clear that *Near's* requirement that the *operation and effect* of the statute must be examined remains in full force and effect where, as here, the statutory sanctions turn on a finding of prior unlawful expressive activity. Since the Indiana Supreme Court failed to follow this clear requirement, its extremely dangerous holding must be reversed.

Because of its fundamentally-flawed analysis regarding the applicability of First Amendment principles, the Indiana Supreme Court likewise ignores the extreme *chilling effect* of these statutes upon almost all commercial First Amendment activity. This Court has repeatedly emphasized that sanctions for the dissemination of obscene materials must not sweep so broadly as to curtail the availability of nonobscene literature and films due to self-censorship on the part of their distributors and exhibitors. *See, e.g., Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963); *Smith v. California,* 361 U.S. 147 (1959). Yet the very existence of these lethal RICO sanctions of pretrial seizure and outright forfeiture, as upheld by the Indiana Court, will unquestionably cause First Amendment businesses and those who deal with them to steer far clear of the "dim and uncertain line" separating obscenity from constitutionally protected expression. *Bantam Books, supra,* 372 U.S. at 66.

As pointed out in the Interest of Amicus, *supra,* unless review is granted by this Court, the chilling effect of the statute will be felt not only by those who actually sell or exhibit media materials, but also by those, including landlords, who deal commercially with such entities. The severe deterrent effect upon landlords will be two-fold: First, they will always have to fear the possibility that a

successful RICO action brought against their tenant could result in the permanent forfeiture of their real estate. Second, even if the statute is construed to prohibit permanent forfeiture of the landlord's real estate, the landlord must nonetheless fear the loss of the value of his property during the potentially lengthy period of time while the pretrial restraints remain in effect. In the present case, the seizure order has been in effect for four years and the landlord has not yet had an opportunity to defend against these charges at trial.

Accordingly, it may be fairly concluded that if the Indiana Court's decision is allowed to stand, landlords will be extremely reluctant to rent their premises to those engaged in expressive activities. Moreover, those landlords that do rent their premises to such entities will inevitably be cast in the role of censor. Because, as mentioned above, landlords cannot practically examine the inventory of tenants engaged in communicative expression, the only way a landlord who rents to a book or video store can protect his or her interest is to impose lease restrictions which prohibit the sale or exhibition of *any* sexually-oriented materials, regardless of whether the tenant reasonably believes them to be entitled to First Amendment protection. As a result, if this Court declines review, the *chilling effect* which flows from these statutes will pose even more wide-ranging threats to the rights of the public to receive First Amendment materials than the more dramatic direct restraints of padlocking and forfeiture.[7]

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[7] The dilemma of the landlord facing the imposition of a prior restraint upon a theater tenant is illustrated by *Vance v.*

(Continued on following page)

In the last analysis, *amicus'* personal stake in this litigation, although substantial, is dwarfed by the importance of these issues as a matter of core First Amendment doctrine. As the Indiana Court of Appeals observed in its scholarly and insightful opinion in this cause, "the guarantees of the First Amendment mean nothing if the state may arrogate such discretion over the continued existence of bookstores and theaters." *4447 Corporation v. Goldsmith*, 479 N.E.2d 578, 601 (Ind.App. 1985).

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CONCLUSION

For the reasons set forth above, Burke H. Mendenhall as *amicus curiae* respectfully urges this Court to grant the petition for writ of certiorari in this case.

DATED: October 30, 1987

Respectfully submitted,

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Universal Amusement Co., Inc., 455 U.S. 308 (1980). After the county attorney informed the landlord he intended to enjoin operation of the theater as a public nuisance, the landlord notified the theater its lease would be terminated. In *Vance*, of course, this Court upheld the Fifth Circuit's invalidation of an injunction against future exhibition of unnamed motion pictures.